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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NO. 15631

JAMES WAYNE HECK,
Petitioner,

versus

DANA LEE HECK (CALES),
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS AT CHARLESTON, WEST VIRGINIA

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AUTHORITIES CITED

CASES:

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_____W. Va. ____, 216 S. E. 2d 520 (1975)
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STATUTES:

W.Va. Code, Chapter 48, Article 2, Section 15 (1981)

REGULATIONS - CONSTITUTIONS:

United States Constitution Amendment XIV
West Virginia Constitution, Article 3, Section 10
United States Constitution Amendment V

MISCELLANEOUS:

70 A. L. R. 3rd, 262

The Petitioner herein, James Wayne Heck, prays that a writ of certiorari issue to review the judgment of the West Virginia Supreme Court of Appeals in the above-entitled case on November 19, 1982 (Court of Appeals Opinion, Infra, p.A- 11) and the denial of the Petition for Rehearing of such matter on March 30, 1983, (Court of Appeals, Ruling, infra, p.A- 17)

OPINIONS BELOW

The opinion of the W. Va. Court of Appeals is included in the Appendix beginning at page A- 11. The opinion of the West Virginia Supreme Court of Appeals and is, as yet, unreported.

JURISDICTION

The final judgment of the court of appeals was entered on March 30, 1983. The jurisdiction of this Court rests on United States Constitution, Article 3, §2 and 28 U.S.C., §1257 (1966).

QUESTIONS PRESENTED

1. Whether the W. Va. Supreme Court of Appeals violated the "Equal Protection" Clause of the U.S. Constitution and the "Due Process" Clause of the U.S. Constitution in its decisions in Garska v. McCoy and Heck v. Heck, cited supra, providing that the custody of minor children shall be awarded to the "primary caretaker parent"?

STATUTE INVOLVED

The relevant portion of W. Va. Code, Chapter 48, Article 2, Section 15 (1980) provides:

In making any such order respecting custody of minor children, there shall be no legal presumption that, as between the natural parents, either the father or the mother should be awarded custody of the children, but the court shall make an award of custody solely for the best interest of the children based upon the merits of each case. For the purpose of making effectual any order provided for in this section the court may make any order concerning the estate of the parties, or either of them, as it shall deem expedient.

STATEMENT OF THE CASE

The Petitioner herein, James Wayne Heck, was the original Defendant in a divorce action in the Circuit Court of Randolph County, West Virginia. The original case was tried before the court, without a jury; and a child custody hearing was held before the court on date of March 12, 1981.

All of the evidence in the case was taken in such March 12, 1981 hearing, and, subsequent thereto, the

West Virginia Supreme Court of Appeals, in a landmark case, rendered its decision in Garska v. McCoy on date of May 26, 1981.

The Garska v. McCoy case was intended by the West Virginia Supreme Court to be the final definitive ruling of said court in child custody proceedings.

The Garska v. McCoy case held that in all child custody proceedings the Circuit Court must determine in the first instance exactly who the primary caretaker is or was, and, having made such determination, must then award the custody of any infant children to such primary caretaker if such primary caretaker achieves the minimum objective standard of fitness. See Garska v. McCoy, 272 S. E. 2d 357, (1981).

The trial court rendered its formal ruling in the original divorce case involving these proceedings on date of June 18, 1981. It is not clear from the record whether or not the trial court had the benefit of the reported version of Garska v. McCoy at the time of its ruling in this case.

The case was successfully appealed by the original Plaintiff and Appellant before the West Virginia Supreme Court of Appeals, and the West Virginia Supreme Court of Appeals, relying on the Garska v. McCoy standard, overruled the trial court on date of November 19, 1982.

A Petition for Rehearing by the Petitioner herein was filed before the West Virginia Supreme Court of Appeals, and the same was denied by such Court of Appeals in its final judgment on March 30, 1983.

In its original Brief the Petitioner herein expressly raised the equal protection and due process questions before such West Virginia Supreme Court of Appeals, however, the West Virginia Appeals Court declined to address such Constitutional issues, it being of the opinion that there is no equal protection violation by the so called "Maternal Preference Rule" or "Primary Caretaker Rule." See J. B. vs. A. B., 242 S. E. 2d 248 (1978) and the denial of such petition for rehearing.

In its ruling in said case, on page 251 the following language is contained. "Even if we were to concede, however, that the parents' rights to custody of their children be subjected to an equal protection analysis, there is no doubt that the presumption would withstand judicial scrutiny. So far, the United States Supreme Court has not decided that gender is a suspect category for equal protection purposes or that classifications based on sex must be subjected to strict scrutiny. It does appear, however, that the United States Supreme Court is examining gender-based distinctions under more stringent standards than the 'rational basis' standard of review ordinarily applied to non-suspect categories. The emerging middle level standard is that '. . .classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.' Craig v. Boren, 429 U.S. 190 at 197, 97 S.Ct. 451, 457, 50 L.Ed. 2d 397 (1976). Under the West Virginia Constitution, the presumption's validity would depend upon whether it bears a rational relationship to a legitimate state purpose. See State ex rel. Piccirillo v. City of Follansbee, W. Va., 233 S.E. 2d (1977); State ex rel. Harris v. Calendine, W. Va. 233 S. E. 2d 318 (1977). Should the presumption of maternal preference be measured by either the applicable state or federal standard, or even a strict scrutiny standard, should one be adopted in the future, it would in our view be constitutional. The sociological, biological and evidentiary reasons which are discussed in the following sections provide sufficient grounds for sustaining the presumption, in the absence of compelling and preponderant evidence of a superior alternative."

"The appellee's argument of both the unconstitutionality and the unsoundness of our presumption is predicated upon recent, dramatic, social changes, which appear to indicate that the presumption is outmoded in today's world. In support of this position he cites In re Marriage of Bowen, 219 N.W. 2d 683 (Iowa, 1974) where

Justice McCormick says:

We do not think either parent should have a greater burden than the other in attempting to obtain custody in a dissolution proceeding. It is neither necessary nor useful to infer in advance that the best interests of young children will be better served if their custody is awarded to their mothers instead of their fathers. We previously emphasized the weakness of the inference; we now abandon it. (219 N.W. 2d at 688)"

The Petition for Rehearing by the Petitioner herein was denied by the West Virginia Supreme Court of Appeals, and a Motion for Stay of Execution was dully filed before such West Virginia Supreme Court of Appeals which was similarly denied on date of March 20, 1983, giving rise to this present Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

The question involved in this case presents an important question of Federal Law which has not been, but should be, resolved by the United States Supreme Court. It involves countless child custody cases throughout the courts of the United States of America which have chosen to adopt the constitutionally inpermissible favoritism on behalf of mothers, and, in so doing, have created an inpermissible gender favoritism in violation of the United States Constitution.

I.

The so called "Maternal Preference Rule" is fundamentally and constitutionally unsound.

The standard annunciated Garska v. McCoy case or "The Primary Caretaker Rule" is wrong insofar as no consideration is given therein to the welfare of the child or children as a factor at least rebutting the presumption established in Garska.

The Garska v. McCoy case attempts to set up a mechanical standard for the determination of child custody

disputes, however, the same must fail since the Garska case can only be read, at most, as creating a presumption to be considered among other factors, such as: fitness of the parties, the best interest and welfare of the children, the trial courts discretion, the preference of the child, etc. See S.H. v. R. L. H., Supra.

In the latter part of the last century, the traditional common-law rule that the father rather than the mother was entitled to the custody and control of their chidlren was replaced. 70 A. L. R. 3rd, 262. The courts adopted the more flexible rule that it is the childs best interest and not the primary right of either parent which is to be the determinative factor in child custody. 70 A. L. R. 3rd, 262, Supra.

The courts then continued to pay lip service to the doctrine that the welfare of the child was to be the paramount and controlling factor, and then swung over to the "Maternal Preference Rule."

This general preference for the mother has rejected in recent cases from several jurisdictions, the courts observing that the paramount and controlling consideration in all disputes over custody are the welfare and best interests of the children. 70 A. L. R. 3rd, 262. In addition to the conflict over the existence of the maternal preference rule under common-law principals there is widespread disagreement among the courts as to what weight should be given this preference.

The courts in a substantial number of jurisdictions have now given their support to the more flexible rule that the preference for the mother may be overcome by showing that the childs best interests require that the father be awarded custody, regardless of whether the mother is found to be a fit parent.

The majority of these courts have now taken the position that the mother-child relationship is merely one of many factors which must be considered by the trial court which retains the broad discretion to make an award which will truely serve the best interest of the child. See 70

A.L.R. 3rd, 269.

But even the view that the "Maternal Preference Rule", or the "Primary Caretaker Rule" is merely a factor which must be balanced against the "Best Interests Principle" has recently been criticized on the dual grounds that it results in custody awards which are not based solely on the child's best interests, and does not fully comport with the statutes and constitutional amendments which provide that equality of rights under the law shall not be denied or abridged on account of sex. See United States Constitution Amendment Fourteen. See also 70 A. L. R., 3rd, 269.

A recent West Virginia case of S.H. v. R. L. H., Supra; shows that the West Virginia Supreme Court of Appeals intended to construe Graska as merely creating a presumption which may be rebutted by other factors.

II.

The West Virginia Legislature has adopted a sex neutral standard based solely upon the best interests of the child or children which standard completely is in accordance with the United States Constitution and the Fourteenth Amendment thereof. See Mormanis v. Mormanis, Supra. The W. Va. Supreme Court has attempted to legislate its constitutionally wrong standard in lieu of such statute.

The West Virginia Supreme Court had previously in the Funkhouser v. Funkhouser, Supra, case attempted to give preference to the Mother in child custody proceedings.

The holding in this case prompted the West Virginia Legislature to enact the present code section, namely W.Va. Code, Chapter 48, Article 2, Section 15, which completely eliminates the so called "Maternal Preference Rule." W. Va. Code, Chapter 48, Article 2, Section 15 (Michie 1931). See statute involved herein.

The Garska v. McCoy case attempts to resurrect this rule under the guise of "primary caretaker", however, this rule does not satisfy the sex neutral standard as outlined in

the West Virginia Legislature in the W. Va. statute.

For the West Virginia Supreme Court to attempt to "rehash" this maternal preference rule under the guise of the primary caretaker theory is an unwarranted usurpation of the separation of powers doctrine and an intrusion on the power of the West Virginia Legislature. For reasons which will be explained hereinafter, the attempted substitution of this rule is also unconstitutional.

III.

The "Equal Protection" Clause of the United States Constitution and the "Due Process" Clause of the United States Constitution would seem to require that consideration be given to the best interests and welfare of the child or children in divorce proceedings. To adopt an attempted mechanical standard as enuniciated by the West Virginia Supreme Court of Appeals deprives such child or children of the constitutional safeguards aforesaid. The West Virginia Supreme Court of Appeals in said mechanical standard completely ignores any consideration being given to the welfare of the child or the children giving them no representation nor voice, and it is respectfully submitted that such child or children's welfare is and are the most important issue or issues before any court in child custody proceedings. Failure to consider said child or children's welfare in child custody proceedings deprives such child or children of due process under our constitution. See U.S. Constitution Amendment V.

IV.

The Petitioner and all other similar males are deprived of equal protection and due process of the law when courts are forced to adopt the mechanical standard enunciated by the West Virginia Supreme Court of Appeals.

The rehash of the maternal preference rule as embodied in the Garska decision constitutionally improperly penalizes any male in child custody proceedings since the

usual primary caretake in almost all cases is the mother who is, by nature, a female. See 70 A. L. R. 3rd 262.

V.

The West Virginia Supreme Court totally disregarded any issues as to fitness or abandonment thereby depriving the children and the Petitioner of due process as can be seen from the denial of the Petition for Rehearing. The West Virginia Supreme Court of Appeals totally refused to consider the fitness and abandonment issues therein raised thereby denying the parties, namely the children and the Petitioner herein, fundamental due process. United States Constitution Article V.

VI.

The United States Supreme Court has not ruled or set a definitive standard as to gender preferences in child custody cases. See J. B. v. A.B., Supra.

The United States Supreme Court should render a landmark decision in such matters due to the enormous influx of such child custody cases into the courts of the United States of America.

By so ruling the United States Supreme Court could be of great help to the Courts of the United States considering child custody cases in: (a) eliminating once and for all the "Maternal Preference Rule" or the alter ego of such rule... "The Primary Caretaker Rule" which have arisen in such courts. (b) in this particular case eliminating the conflict between the West Virginia Legislature and the West Virginia Supreme Court as seen from the statute cited in this brief and the rulings in the appendix to this brief. (c) granting the children and male persons of the United States of America due process and equal protection under the U.S. Constitition.

CONCLUSION

For the reasons stated herein this Pettion for Writ of Certiorari should be granted.

Respectfully submitted,
(s) James F. Cain
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IN THE CIRCUIT OF RANDOLPH COUNTY,
WEST VIRGINIA

DANA LEE HECK,
Plaintiff

vs. CIVIL ACTION NO. 81-C-2

JAMES WAYNE HECK,
Defendant

SUPPLEMENTAL ORDER

Pursuant to an Order entered February 24, 1982 by the West Virginia Supreme Court of Appeals directing this court to make specific findings of fact and conclusions of law concerning the awarding of custody of two infant children born of the marriage, namely, Diana Marie Heck, age four and a half years and Jamie Leigh Heck, age three and a half years. Therefore, this supplemental order.

FINDINGS OF FACT

After hearing the evidence presented, the court found and determined that:

(1) Both parties have shared parental responsibilities during the marriage, each in their role as mother and father with the duties as normal parents.

(2) That the father provided and will continue to provide a more stable environment for the children.

(3) That the children relate better to the father.

(4) That considering the age of the children that the evidence failed to establish that either parent had "clearly taken primary responsibility for the caring and nurturing duties for the children. Garska v. McCoy 278 SE 2d 357 (1981) Syllabus Point 5.

(5) That the mother testified that she intended to remarry (which in fact she has) and therefore they would be reared by a stepfather of which the court knows absolutely nothing.

(6) The father owns a fine home in an excellent neighborhood in a fine town to rear children.

(7) The mother will reside on a riverboat on the Ohio River at Huntington.

CONCLUSIONS OF LAW

The Court further finds from the intent of the legislators, West Virginia Code, Chapter 48, Article 2, Section 15 (1980), that a sex-neutral standard is to be applied in West Virginia for custody determination based upon the best interests of the children, See Garska, supra. In fact, the Supreme Court has recently reaffirmed the long-standing principle that "[i]n a contest involving the custody of an infant, the welfare of the child is the polar star by which the discretion of the Court will be guided.' Syllabus Point 1, Holstein v. Holstein, 152 W. Va. 119, 160 S.E. 2d 177 (1968)." Taylor v. Taylor, _____S.E. 2d ____ (W.Va. Sup. Ct. No. 15355, December 15, 1981. Which will continue to be the law in Randolph County.

Garska v. McCoy is clearly wrong if it mandates that: "In a divorce proceeding where custody of a child of tender years is sought by both mother and father, trial court must determine in first instance whether primary caretaker is a fit parent, and where primary caretaker achieves minimum, objective standard of behavior which qualified him or her as a fit parent, trial court must award child to primary caretaker. Code, 48-2-15."

When placing the child would not be in its best interest or its welfare.

If the trial court has no discretion in awarding custody of children then the West Virginia Supreme Court of Appeals should have original jurisdiction in these matter.

If you follow Garska the father could never get custody of his children unless the mother was the sole breadwinner and the father stayed home and was the housekeeper, nursemaid and primary caretaker.

Where both parents work eight hours, sleep eight hours and both are with the children the other eight hours, it is nigh on to impossible to determine which is the "primary caretaker."

It is therefore ADJUDGED, ORDERED and DECREED that the custody, control, rearing, etc. of these two infant children heretofore ordered shall remain as ordered.

ENTER: June 2, 1982

(s) Jack R. Nuzum
Judge

A TRUE COPY:
ATTEST: Newton F. Riggleman, Clerk
Clerk of the Circuit Court

By (s) Debra K. Channell
Deputy

No. 15631
DANA LEE HECK

v.

JAMES WAYNE HECK

Randolph County Reversed and Remanded

Per Curiam
Syllabus

"In a divorce proceeding where custody of a child of tender years is sought by both the mother and father, the court must determine in the first instance whether the primary caretaker is a fit parent, and where the primary caretaker achieves the minimum, objective standard of behavior which qualifies him or her as a fit parent, the trial court must award the child to the primary caretaker." Syllabus point 6. Garska v. McCoy, _____W.Va. ____, 278 S.E. 2d 357 (1981).

Per Curiam:

Appellant, Dana Lee Heck,* appeals from a July 2, 1982 final order of the Circuit Court of Randolph County awarding permanent custody of the parties' two minor children to appellee, James Wayne Heck. The July 2 order was entered pursuant to a February 24, 1982 order of this Court remanding the matter to the circuit court to make specific findings of fact and conclusions of law regarding the award of custody. Appellant contends that on remand the trial court failed to follow the mandate of Garska v. McCoy, _____W.Va. ____, 278 S.E.2d 357 (1981) that custody be awarded to a fit primary caretaker who has not waived or otherwise relinquished his or her right to custody. It is clear that the trial court failed to follow Garska, and we reverse and remand.

*Appellant remarried during the course of this litigation and her surname is now Cales.

We observe initially that neither of the parties' fitness as a parent has been challenged, and that nothing in the record indicates that either is in any way unfit to have custody of the children.

On January 7, 1981 appellant filed a complaint against appellee seeking a divorce and requesting temporary and permanent custody of the parties' two daughters. The appellant was employed full time by the Randolph County School Board as a sixth-grade teacher. Appellee was employed as a distrbutor of chainsaws. At a March 12, 1981 hearing in this matter one of the girls was four and one-half years of age and the other was three and one-half years of age. At the hearing appellant claimed to have general responsibility for cooking meals, reading books to the girls, taking them to the doctor and for supervising them at home in the evenings. She called two witnesses who supported her contention that she was the children's primary caretaker.

On direct examination appellee made no affirmative claim that the appellant was not the primary caretaker. During cross examination the appellee engaged in the following colloquy with trial counsel for appellant:

"Q. Well, let me ask you this, whenever the two of you have been together with the children, who, basically, had the responsibility of feeding, bathing, and putting the children to bed, diapering the children and this sort of thing?

A. She did, she's a mother.

Q. And she still a mother (sic)?

A. She is, yes.

Q. And she did have that basic responsibility on her behalf, right?

A. Yes, she did.

******

Q. Okay, she did most of it, and you did some of it?

A. Right.

Q. Why didn't you do most of it?

A. Why should I, I'm earning a living for her.

MR. (JAMES F.) CAIN: (COUNSEL FOR APPELLEE)

He has a good job, that's my objection.

THE COURT: Well, he answered it.

Q. And your answer was, why should I, you're earning a living?

A. Sure."

While several witnesses, including appellant's mother, Betty Duckwell, testified that in their opinion, the girls would be better served by placing them in the custody of appellee, none suggested that appellant was not the primary caretaker. In fact, the bulk of the testimony by appellee's witnesses tended to reinforce appellant's contention that she was the primary caretaker. For instance, during corss examination of Duckwell the following exchange occurred:

"Q. Did he (appellee) diaper the kids?

A. I beg your pardon?

Q. Did he diaper the kids? Did he feed the kids?

A. A man usually doesn't do these things the first year or two because his children are small. That's the mother's responsibility."

Another defense witness, James Parsons, based his opinion that the custody of the children should be given to appellee upon the fact that in 1979 appellant had absented herself from the home to attend the summer session of West Virginia University. However, Parsons admitted that he thought attending summer school was a good idea and that he had encouraged appellant to remain in school. Partially as a result of attending summer school appellant did subsequently receive her master's degree.

Appellee noted that appellant returned home on Thursdays and left on Monday mornings during the period she attended summer school. Appellee's testimony regarding these weekends further indicates appellant's role in the family:

"Q. Okay, then in the course of that long weekend thing from Thursday or Friday through Monday morning did she then take care of the laundry and get everything ready for the next week when you'd be with the kids?

A. Yes, sir."

Appellee further testified that the decision for appellant to attend summer school was made jointly by the parties.

Finally, we turn to the trial judge's supplemental order of July 2, 1982, issued in response to our February 24, 1982 order requiring him to make specific findings of fact and conclusions of law. The trial judge did not find that appellant was not the primary caretaker, nor did he conclude that the appellant was unfit to have custody of her daughters. Rather, the lower court complained that syllabus point 6 of Garska v. McCoy, _____W.Va. ____, 278 S.E.2d 357 (1981) was "clearly wrong", and declined to follow it.

Syllabus point 6 of Garska, supra, states as follows:

> "In a divorce proceeding where custody of a child of tender years is sought by both the mother and father, the court must determine in the first instance whether the primary caretaker is a fit parent, and where the primary caretaker achieves the minimum, objective standard of behavior which qualifies him or her as a fit parent, the trial court must award the child to the primary caretaker."

In syllabus points 3 and 4 of Garska we defined primary caretaker and established broad standards for trial courts to use in determining whether any party to an action is a primary caretaker. Syllabus point 3 states:

> "The primary caretaker is that natural or adoptive parent who, until the initiation of divorce proceedings, has been primarily responsible for the caring and nurturing of the child."

Syllabus point 4 explicitly applies the criteria established in the definition above to the trial court's determination of whether a party is the primary caretaker:

> "In establishing which natural or adoptive parent is the primary caretaker, the trial court shall determine which parent has taken primary responsibility for the caring and nurturing duties of a parent."

It remains only for us to apply the law established in Garska to the facts of this case.

There is no significant evidence in the record to indicate that appellee had a major role in the caring and nurturing duties for the children. The evidence adduced revealed that while both parents had been employed full time during most of the marriage, appellant had been the primary caretaker for the parties' two girls. In fact, both the appellee and the trial court implicitly recognized appellant's role as primary caretaker.

In the absence of any allegation of unfitness, much less a finding of unfitness by the trial judge, appellant, as the primary caretaker, is entitled to permanent custody of the parties' two children. We reverse and remand with directions that the circuit court enter an order in accord with the principles expressed herein.

Reversed and Remanded

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 30th day of March, 1983, the following order was made and entered, to-wit:

Dana Lee Heck (Cales), Plaintiff Below, Appellant
vs. (5631)
James Wayne Heck, Defendant Below, Appellee

The Court having maturely considered the petition for rehearing and reargument filed in the captioned action is of opinion to, and doth hereby deny the prayer of the petition and doth order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

(s) Attest: George W. Singleton
Clerk Supreme Court of Appeals